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No. 92-1547

In the Supreme Court of the United States

OCTOBER TERM, 1992

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

TRANSCON LINES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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1. Respondents' contention that the ICC may not enforce its credit regulations against Transcon and its trustee rests on a basic error. According to respondents (Br. in Opp. 5), the ICC is seeking to "'step into the shoes' of the shipper" in requesting an injunction that would preclude the carrier from collecting certain charges in violation of the ICC's credit regulations. Respondents then argue (Br. in Opp. 5-6, 14) that, because this Court has held that a *shipper* may not assert the carrier's violation of the credit regulations as an equitable defense to a

carrier's collection action, see *Southern Pacific Transp. Co.* v. *Commercial Metals*, 456 U.S. 336, 349 (1982), the ICC is likewise foreclosed from enjoining the carrier's collection of charges in violation of the credit regulations.

The ICC, however, is not asserting the rights of shippers in seeking an injunction against respondents; the ICC is relying on its own statutory rights and powers to enforce the Act. The ICC has express authority to "bring a civil action—to enforce this subtitle * * * or a regulation or order of the Commission * * * when violated by a [motor] carrier providing transportation subject to the jurisdiction of the Commission * * *." 49 U.S.C. 11702(a)(5); Pet. App. 64a-65a. The action brought by the ICC against respondents enforces the regulations of the Commission governing when a carrier may release goods without payment and collect damages for late payment. Those regulations are explicitly authorized by the statutory prohibition of credit transactions except in accordance with ICC regulations. 49 U.S.C. 10743.

Thus, in bringing this action, the ICC is relying wholly on *its* statutory authority to enforce the Act. Indeed, respondents' argument turns the Court's analysis in *Commercial Metals* on its head. The Court explained in *Commercial Metals* that shippers may not resist payment through the ad hoc assertion of credit-regulation defenses in particular cases, because "[t]he remedies for a carrier's violation of the [credit] regulations are best left to the ICC for such resolution as it thinks proper." 456 U.S. at 352. The Court stated that such remedies include "the power to seek a federal-court injunction requiring a carrier

to comply with the regulations." *Id.* at 349. If respondents' theory were accepted, the Commission would be powerless to obtain effective relief against a defunct carrier, like Transcon, whose trustee flouts the ICC's credit rules.[1]

2. Respondents err in claiming (Br. in Opp. 6, 9) that *Maislin Indus., U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116 (1990), insulates them from the ICC's injunction action. *Maislin* dealt with a policy that permitted the enforcement of unfiled, negotiated rates; this Court invalidated that policy "because it would 'rende[r] nugatory' the specific command of [49 U.S.C.] § 10761 that the carrier charge the filed rate." *Reiter* v. *Cooper*, 113 S. Ct. 1213, 1216 (1993); *Maislin*, 497 U.S. at 133. *Maislin* does not bar the ICC from remedying a violation by "requir[ing] only the application of a different filed rate * * * rather than departure from the tariff schedule entirely." 497 U.S.

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[1] Respondents concede (Br. in Opp. 7) that the ICC has the power to "seek injunctions against carriers that violate its credit regulations." They assert (*id.* at 14), however, that *Commercial Metals* does not authorize an injunction where the ICC seeks to prevent the collection of charges in violation of the credit regulations. But respondents fail to explain how else the ICC could use an injunction to enforce its credit regulations against a bankrupt carrier whose trustee is systematically violating the ICC's credit regulations. While respondents mention remedies against operating carriers, and raise the possibility of fines against culpable individuals (*id.* at 13), it is clear that respondents' real aim is to retain the freedom to collect additional charges from shippers, admittedly in violation of the ICC's credit regulations (*id.* at 3), with complete impunity. That claim cannot be squared with the Court's statement in *Commercial Metals* that it is for the ICC to select the appropriate remedy for credit-regulation violations.

at 129 n.11 (citing *Hewitt-Robins Inc.* v. *Eastern Freight-Ways, Inc.*, 371 U.S. 84, 86 (1962), and *Adams* v. *Mills*, 286 U.S. 397, 412 (1932)). At most, that would be the effect of the ICC's requested injunction here.[2] See Pet. 12-15.

The injunction requested by the ICC would not foreclose the carrier from charging a filed rate. Respondents are entitled to collect the filed *discount* rate, which was the rate due upon delivery of the goods. Respondents can also collect interest charges from late-paying shippers, in order to be made whole for any delay in payment.[3] The effect of the requested injunction is simply to prevent respondents from prosecuting collection actions that clearly violate the credit regulations. *Maislin* does not preclude that remedy.

3. As our petition explains (Pet. 14-15), the court of appeals' characterization of *Maislin* is one that this Court clearly rejected in *Reiter* v. *Cooper*, *supra*. Respondents seek to avoid (Br. in Opp. 6-7) the impact of *Reiter* on this case by making the same fallacious argument discussed above—that the ICC is asserting the rights of shippers. That is not so.

The relevance of *Reiter* to this case lies in the Court's clarification that the filed rate doctrine,

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[2] As we argue in our petition (Pet. 11-12), the additional charges that the ICC seeks to enjoin respondents from collecting constitute liquidated damages, not a filed rate. But even if we assume that they are a filed rate, *Maislin* is inapplicable to the issue of *which* of two filed rates applies.

[3] Because the shippers must pay interest, see Pet. 4 n.4, respondents err in suggesting (Br. in Opp. 12) that late-paying shippers would gain any advantage over shippers who paid on time.

while precluding "common-law claims and defenses," does not preclude "avoidance of the tariff rate * * * through claims and defenses that are specifically accorded by the [Interstate Commerce Act] itself." 113 S. Ct. at 1219. In *Reiter*, the claim accorded by the Act was the right of a shipper to obtain reparations (49 U.S.C. 11705(b)(3)); here, the claim accorded by the Act is the statutory right of the ICC to obtain an injunction to enforce its credit regulations. In both cases, the same principle applies: the filed rate doctrine does not override all other requirements of the Act, but must be harmonized with those other requirements.

The court of appeals failed to harmonize the filed rate doctrine with the Act's prohibition of credit transactions except as authorized by the ICC's credit regulations and with the agency's authority to seek injunctions to enforce those requirements. The result is that respondents stand to collect substantial unjustified charges, and the agency with authority to enforce the credit regulations is denied an effective means to carry out that responsibility. Respondents give no adequate reason for letting that judgment stand.

For the foregoing reasons, and those stated in our petition, the petition for a writ of certiorari should be granted, the judgment should be vacated, and the case remanded for further consideration in light of *Reiter* v. *Cooper*, *supra*. In the alternative, the judgment of the court of appeals should be summarily reversed, on the authority of that decision and *Southern Pacific Transp. Co.* v. *Commercial Metals*, *supra*.

Respectfully submitted.

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